

NO. PD-1199-17

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

ANDREW LEE WILLIAMS
APPELLANT

VS.

THE STATE OF TEXAS
APPELLEE

On Petition for Discretionary Review from
The Fourteenth Court of Appeals
in No. 14-16-00458-CR Affirming
The 239th Criminal District Court of
Brazoria County, Texas, Cause No. 75253-CR,
Honorable Patrick Sebesta, Judge Presiding

APPELLANT'S BRIEF ON DISCRETIONARY REVIEW

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IDENTIFICATION OF THE PARTIES

Pursuant to TEX. R. APP. P. 38.1 (a), the following are interested parties:

Presiding Judge:

Patrick Sebesta
239th District Court
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Angleton, Texas 77515

Appellant:

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STATEMENT OF THE CASE

Appellant was indicted in a two-count indictment for the charges of Manslaughter and Accident Involving Injury. Over Appellant's objection at trial, the trial court allowed the admission of blood test results performed by an out-of-state laboratory, NMS Laboratory, without the testimony of the chemist who conducted the tests. Appellant contends that the trial court denied him the right guaranteed by the Sixth Amendment to the United States Constitution to confront the chemist about the blood test results. Appellant also contends that he did not waive his right to confront the chemist by failing to timely object, prior to trial, to the laboratory's Certificate of Analysis because the certificate failed to substantially comply with Article 38.41 when the affiant was not the person who conducted the testing.

On May 9, 2016, a jury found Appellant Williams guilty of both offenses. On May 10, 2016, the jury assessed a sentence of 60 years in the Texas Department of Criminal Justice for both offenses of Manslaughter and Accident Involving Injury. The Fourteenth Court of Appeals affirmed in a published opinion. **Williams v. State**, 531 S.W.3d 902 (Tex. App. – Houston [14th Dist.] 2017, pet. gr't'd)

STATEMENT OF THE PROCEDURAL HISTORY

This Court granted discretionary review on March 21, 2018 and granted an extension of time to file Appellant's Brief until May 7, 2018.

GROUND FOR REVIEW

1. The Court of Appeals erred in holding that Appellant waived his right to confrontation under the Sixth Amendment to the United States Constitution by failing to file a written objection to the use of the analyst's blood test results no later than ten days before trial.

SUMMARY OF THE ARGUMENT

The Court of Appeals erred in holding that Appellant's right to confront the chemist who tested Appellant's blood for the presence of drugs was waived because Appellant failed to file a written objection to the laboratory's report no later than ten days before the trial began. Appellant contends that he has a Sixth Amendment right to confront and cross-examine the chemist who tested his blood for the presence of drugs. Appellant also contends that the laboratory report's Certificate of Analysis did not substantially comply with Texas's notice-and-demand

statute because the chemist who tested Appellant's blood was not the affiant of the certificate.

ARGUMENTS AND AUTHORITIES

A certificate of analysis is admissible as evidence at trial to establish the results of the laboratory analysis without requiring the analyst to physically appear at trial and testify if the certificate complies with the statutory requirements of Article 38.41. **Tex. Code Crim. Proc., Art. 38.41, Sec. 1** (West 2017) The proponent of the certificate of analysis must file the certificate with the court and send a copy to the opposing party no later than 20 days before trial. **Tex. Code Crim. Proc., Art. 38.41, Sec. 4** (West 2017) The certificate of analysis is not admissible if the opposing party files a written objection with the court no later than 10 days before trial. **Tex. Code Crim. Proc., Art. 38.41, Sec. 4** (West 2017) An opposing party waives any objection to the certificate if he fails to make a timely objection under this statute. **Deener v. State**, 214 S.W.3d 522, 527-528 (Tex. App. – Dallas 2006, pet. ref'd) A certificate of analysis that substantially complies with Section 5 of this statute is sufficient to meet the requirements of the statute. **Tex. Code Crim. Proc., Art. 38.41, Sec. 5** (West 2017)

The Fourteenth Court of Appeals relied upon two unpublished opinions which held that both laboratories' certificates of analysis did substantially comply with the certificate provided in Section 5 of Article 38.41 even though they did not contain all of the language of the statutory certificate. In **Lopez v. State**, No. 08-10-00285-CR, 2012 WL 1658679 (Tex. App. – El Paso May 9, 2012, no pet.) the court held that a certificate substantially complied with the statute even though it failed to state that the tests or procedures used were reliable. In **Johnson v. State**, No. 07-07-00327-CR, 2009 WL 102930 (Tex. App. – Amarillo Jan. 15, 2009, no pet.) the court held that a certificate substantially complied with the statute even though it lacked a statement that it was an accredited laboratory because the attached laboratory report contained a statement that the laboratory was accredited by the American Society of Crime Laboratory Directors.

Appellant contends that the error in his Certificate of Analysis differs greatly from the previous two examples because the affiant in the NMS Laboratory's Certificate of Analysis Affidavit was not the same person who conducted the actual testing of Appellant's blood. The suggested certificate of analysis affidavit in this Article requires the affiant to be the person who conducted the analysis of the substance by

providing the following language: “I received the physical evidence listed on laboratory report no. _____ (attached) on the ____ day of _____, 20____. On the date indicated in the laboratory report, I conducted the following tests or procedures on the physical evidence: (description of tests and procedures).” **Tex. Code Crim. Proc., Art. 38.41, Sec. 5** (West 2017) The Certificate of Analysis Affidavit signed by Dr. Wendy Adams and filed with the court on March 14, 2016 stated that she reviewed the data from the tests or procedures on the toxicological evidence on the 11th day of March 2016. Appellant contends that this affidavit does not meet the requirements of Article 38.41 because Dr. Wendy Adams only reviewed the data and did not personally conduct the tests of the toxicological evidence.

Appellant argues that a certificate that does not contain the sworn affidavit of the chemist who personally conducted the testing does not substantially comply with Section 5 of Article 38.41. A review of the statutorily suggested certificate reveals that the first 5 paragraphs begin with the following statements: 1) “My name is ...”; 2) “I am employed ...”; 3) “My educational background is ...” 4) My training and experience”; and 5) “I received the physical evidence...”. Appellant contends that the purpose of this statute was to require the actual

chemist who tested the substance to complete and swear to this affidavit because that was the person who would have been called to testify at trial. If the Texas Legislature was permitting a Certificate of Analysis to substitute for a trial witness, then the trial witness who tested the toxicological substance must be the person executing the affidavit. While Section 4 of Article 38.41 provides that the affidavit is inadmissible if the opposing party files an objection to the affidavit no later than 10 days before the trial begins, Appellant contends that this section would only apply to an affidavit that was not executed by the chemist who tested the toxicological substance.

Moreover, Appellant contends that he had a constitutional right to confront and cross-examine the person who conducted the testing of his blood for any illegal drugs under the Sixth Amendment to the United States Constitution and Article 1, Section 10 of the Texas Constitution. At trial, Appellant objected to the Brazoria County Crime Lab chemist Sam Wylie's testimony about drug test results performed by the NMS Laboratory in Pennsylvania as violating the confrontation clause in the Sixth Amendment to the United States Constitution. The Sixth Amendment to the United States Constitution provides that in all criminal

prosecutions that an accused shall enjoy the right to be confronted with the witnesses against him and also guarantees a defendant's right to confront those who bear testimony against him. **Melendez-Diaz v. Massachusetts**, 557 U.S. 305; 129 S.Ct. 2527 (2009) A witness' testimony against a defendant is thus inadmissible unless the witness appears at trial or the defendant had a prior opportunity for cross-examination, if the witness is unavailable. **Crawford v. Washington**, 541 U.S. 36, 54 (2009).

In **Melendez-Diaz**, the United States Supreme Court held that a laboratory's certificate of analysis affidavit is functionally identical to live, in-court testimony made for use at a later trial. **Melendez-Diaz**, at 2532. In holding that the admission of the certificate of analysis affidavit without the affiant's testimony violated the defendant's Sixth Amendment right to confront the witness against him, the court held that "the analyst's affidavits were testimonial statements, and the analysts were "witnesses" for the purpose of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to be confronted with the analysts at trial." **Melendez-Diaz**, at 2532.

The United States Supreme Court noted that a defendant may waive his right to confrontation by failing to object to the offending evidence in accordance with a state's procedural rules. **Melendez-Diaz**, 557 U.S. at 314, 129 S.Ct. at 2534, n. 3. Appellant contends that he did not waive his right to confrontation by failing to object to the certificate when the certificate of analysis failed to substantially comply with the statute. Appellant was entitled to know the identity of his accuser before he could confront him. The NMS Laboratory Certificate of Analysis affidavit failed to substantially comply with the statute because it failed to name Appellant's accuser – the person who conducted the testing. The certificate's affiant, Wendy Adams, only reviewed the data after the testing had been completed by another person who was never named in the certificate. The failure to name the person who conducted the testing and then have that person swear to the certificate's affidavit is not an inconsequential part of the certificate. Appellant contends that the failure to name the accuser in the certificate's affidavit meant that the certificate was not in substantial compliance with the statute.

Therefore, the Court of Appeals erred in holding that Appellant forfeited his right to confrontation by failing to file a written objection to the certificate of analysis.

PRAYER FOR RELIEF

Appellant prays that the decision of the Fourteenth Court of Appeals be reversed, and the cause remanded to that court for further proceedings not inconsistent with this Court's opinion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Brief, as calculated under Texas Appellate Rule of Appellate Procedure 9.4, contains 2,146 words as determined by the Word program used to prepare this document.

/s/ Crespin Michael Linton
Crespin Michael Linton

CERTIFICATE OF SERVICE

I do hereby certify that on this the 7th day of May 2018, a true and correct copy of the foregoing Appellant's Brief was served by E-service in compliance with Local Rule 4 of the Court of Appeals or was served in compliance with Article 9.5 of the Rules of Appellate Procedure delivered to the Assistant District Attorney of Brazoria County, Texas, 111 E. Locust, Suite 400 Angleton, TX 77515 at davidb@brazoria-county.com. and the State Prosecuting Attorney, P.O. Box 12405 Austin, Texas 78711 at information@spa.texas.gov.

/s/ Crespin Michael Linton
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